

2009

# The State of Utah v. Spence Russel Strode : Reply Brief

Utah Court of Appeals

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The State of Utah  
Plaintiff/Appellee

vs.

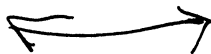
Spencer Russell Strode  
Defendant/Appellant

In the Utah Court of Appeals  
Case No.: 20091023-CA

Appellant's Reply Brief

Appeal from the Eighth District Court, Uintah County, Judge A. Lynn Payne

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### **STATE CASES**

*State v. Tiedemann*, 162 P.3d 1106 (Utah 2007)

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## **ARGUMENT**

Defendant met the burden necessary to prove ineffective assistance of counsel by showing deficient performance in failing to dismiss. The state argues that the defendant failed to present significant evidence of harm in the destruction of evidence as a result of the defendant's testimony about the purpose of the text message. However, the real danger is the risk of confusion as the combination of the loss of the text message in conjunction with the loss of the witness.

It seems clear that the witness had arrived to cause physical harm to the defendant and was privy to a cause to create physical harm. The threat of harm to the defendant the witness gave to the police by the witness was minimal; however, the witness had every reason to lie.

The witness had a criminal record and an association with the victim. He had some kind of knowledge of the nature of who the witness was and what he could do. The witness's story, while plausible at times to some, could be attacked with great credibility with the defense counsels probing.

However, despite defense counsels efforts to locate the witness, the witness remained hidden. Thus the value of the defendant's testimony was limited to what officers were able to extract from him during his testimony. This is not adequate for the purpose of determining self defense. The nature of the threat posed to the defendant was the critical defense presented by trial counsel.

Failure to provide that message, where there could be summaries or errors in the transcription is a blatant failure of the police to preserve evidence that could provide a critical element of defendant's defense that is both probative and instructive.

While this may appear to be petty, the case relied on in Appellant's Opening Brief, *State v. Tiedemann*, 162 P.3d 1106 (Utah 2007), provides the analysis that the failure of the state to preserve evidence that is exculpatory, with all of the information available in that storage, provides grounds for a dismissal. The state does correctly limit this to times when the prejudice is great or where the state has shown bad faith. This is one of those cases. The destruction of evidence was a critical misstep by officers in the prosecution of this case which deprived defense counsel from exploration into the victim's intent during the attack. Further, the cross-examination of the defendant could have been aided by the presentation of evidence that would have proven the victim's violent intent, or could have given indication that there was a gun present. Furthermore, defense counsel's failure to utilize said failure in an attempt that would likely have resulted in dismissal is clearly deficient as to the standards necessary in challenging these statements.

While the state claims that the use of the police interview to provide this evidence, this evidence is lacking substance that may have been detailed in the actual message sent by the victim. In fact, the absence of the witness at trial makes the actual text message more valuable. Defense counsel lost the opportunity to cross-examine and question the witness either about the defendant, the message, or his part. However, what exactly was sent via text message could have provided the context to rebuff the witness's police interview that he was only there for a physical beating and not for something more serious, that the use of guns would entail. The state's argument that the evidence presented to the jury was a complete picture is flawed. The defendant shot the victim four times, yes...but what happened that caused this action? The jury heard something

from the witness that, while probative, provided insufficient insight into the threat present with the defendant on that fateful night.

Because the officers failed to preserve necessary and crucial information, the case never should have gone to trial, under the *Tiedemann* case. Further, since defense counsel failed to move to dismiss based on this information, his efforts were deficient to the standard that would meet the Ineffective Assistance of Counsel Standard. As a result, this court should dismiss the Appellant's conviction of attempted murder.

Dated this 29th day of June, 2011.

BRETT M. KRAUS

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*Attorney for the Appellant*

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Appellant's Corrected Opening Brief* was mailed to the following this 29<sup>th</sup> day of June, 2011:

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